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No. 244

In the Supreme Court of the United States

October Term, 1956.

C. ED HACKENDORF, *d/b/a* SUN BEARING SUPPLY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION for WRIT of CERTIORARI

To the United States Court of Appeals for the Tenth Circuit.

R. F. ROBERTS,
420 Goodhue Building,
Beaumont, Texas,

S. J. CLENDINNING,
802 Ritz Building;
Tulsa, Oklahoma,
Attorneys for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1956.

No. .....

C. ED HACKENDORF, *d/b/a* SUN BEARING SUPPLY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Tenth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, C. Ed Hackendorf, *d/b/a* Sun Bearing Supply, prays that a writ of certiorari issue to the United States Court of Appeals for the Tenth Circuit to review the decision of that court rendered April 5, 1957 (R., p. 3), rehearing denied May 28, 1957 (R., p. 49), affirming the judgment of the District Court of the United States for the Northern District of Oklahoma.

Opinions Below.

The Findings of Fact and Conclusions of Law of the District Court (O. R., p. 29), but are unreported.

The opinion of the Court of Appeals (R., p. 3) is not yet reported. (App., p. 1.)

Jurisdiction.

The date of the judgment, and the date of its entry, sought to be reviewed is April 5th, 1957.

The date of the order denying a rehearing is May 28, 1957.

The jurisdiction of the Court arises under U. S. C., Title 28, Section 1254.

QUESTION PRESENTED.

The article involved is a second hand automobile motor. It is known, in a manufacturing sense, as a combination—it is made up of complete component parts.

First Question.

Whether petitioner's activity of merely putting complete parts together, thus assembling a combination, is a manufacturing operation.

Second Question.

Whether Petitioner's Assembly department, maintained as a separate department, is equivalent to a separate entity, for excise tax purposes.

Third Question.

Whether the manufacturer's excise tax applies to the second sale of an automobile motor—a combination—when it is conceded that such tax does not apply to the second sale of an automobile which the motor becomes a part.

Fourth Question.

Whether the mere disassembling, cleaning, and reassembling of second hand motors by replacing worn out parts with new tax paid parts and resurfacing partially worn parts—on which petitioner pays a tax—constitutes repairs to the motor as a whole, when it is conceded that such reworking merely refits the motor to efficiently function during its normally expected life, and also when it is conceded that the same reworking operations performed on a second hand automobile, a second hand water pump, a second hand battery, a second hand windshield wiper

motor, etc., constitute reconditioning and not manufacturing.

FIFTH QUESTION.

Whether, in his reassembling operations, petitioner's use of parts produced by him and on which he pays the tax—incurs a further tax on the entire assembled motor upon his assembly and sale, when it is conceded that if he purchases from other entities, who pays the tax, the same parts he produces, instead of himself producing said parts, he incurs no tax whatsoever.

SIXTH QUESTION.

Whether, under subparagraph (c) of Article 4 of Regulation 46, petitioner should be regarded the same as a vendee of a motor in a knock down condition, with regard to his reassembly operations.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

Constitutional Provision Involved.

The constitutional provision involved is Clause 1, of Section 8 of Article 1, commonly known as the Uniformity Clause of the Constitution, which is as follows:

> "the congress shall have power to lay and collect taxes, duties, imposts, and excises * * * but all duties, imposts, and excises shall be uniform throughout the United States."

Statutes Involved.

The statutes involved here are as follows:

Internal Revenue Code (26 USCA), Sec. 3403:

> "There shall be imposed upon the following articles sold by the manufacturer, producer, or importer,

a tax equivalent to the following percentages of the price for which so sold:

"(*a*) (Truck chassis, truck bodies, highway tractors);

"(*b*) (Other automobile chassis, bodies and motorcycles);

"(*c*) (As amended by Sec. 544 (a), Revenue Act of 1941, c. 412, 55 Stat. 687, Sec. 605 (c), Revenue Act of 1950, c. 994, 64 Stat. 906, and Section 481 (c), Revenue Act 1951, C. 521, 65 Stat. 452.) Parts or accessories (other than tires and inner tubes and other than radio and television receiving sets) for any of the articles enumerated in subsection (a) or (b), 8 per centum, except that on or after April 1, 1954, the rate shall be 5 per centum. For the purposes of this subsection and subsections (a) and (b), spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in subsection (a) or (b), shall be considered parts or accessories for such articles, whether or not primarily adapted for such use. This subsection shall not apply to chassis or bodies for automobile trucks or other automobiles. Under regulations prescribed by the Commissioner, with the approval of the Secretary, the tax under this subsection shall not apply in the case of sales of parts or accessories by the manufacturer, producer, or importer to a manufacturer or producer of any of the articles enumerated in subsections (a) or (b). If any such parts or accessories are resold by such vendee otherwise than on or in connection with, or with the sale of, an article enumerated in subsections (a) or (b) and manufactured or produced by such vendee, then for the purpose of this section the vendee shall be considered the manufacturer or producer of the parts or accessories so resold. In determining the sale price of a rebuilt automobile part or accessory there

shall be excluded from the price, in accordance with regulations prescribed by the Secretary, the value of a like part or accessory accepted in exchange."

The Revenue Act of 1954 is substantially the same as the above.

Internal Revenue Code (26 USCA), Sec. 3443 (a) (1):

"(a) A credit against tax under this chapter, or a refund, may be allowed or made——

"(1) to a manufacturer or producer, in the amount of any tax under this chapter which has been paid with respect to the sale of any article (other than a tire, inner tube, or automobile radio taxable under Section 3404) purchased by him and used by him as material in the manufacture or production of, or as a component part of, an article with respect to which tax under this chapter has been paid, or which has been sold free of tax by virtue of Section 3442, relating to tax-free sales."

Internal Revenue Code (26 USCA), Section 3444 (a):

"(a) If—

(1) any person manufactures, produces, or imports an article (other than a tire, inner tube, or automobile radio taxable under Section 3403) and uses it (otherwise than as material in the manufacture or production of, or as a component part of, another article to be manufactured or produced by him which will be taxable under this chapter or sold free of tax by virtue of Section 3442, relating to tax-free sales); or

(2) any person manufactures, produces or imports a tire, inner tube, or automobile radio taxable under Section 3404 and sells it on or in connection with, or with the sale of, an article taxable under Section 3403 (a) or (b), relating to the tax on automobiles, or uses it; he shall be liable for tax under this chapter in

the same manner as if such article was sold by him, and the tax (if based on the price for which the article is sold) shall be computed to the price at which such or similar articles are sold, in the ordinary course of trade, by manufacturers, producers, or importers thereof, as determined by the Commissioner."

Regulations Involved.

The Regulations involved are as follows (Regulations 46):

"Section 316.4. *Who Is a Manufacturer.* The term 'manufacturer' includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.

"Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnished materials and retains title thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufacturers or produces it, will be considered the manufacturer.

"A manufacturer who sells a taxable article in a knock down condition, but complete as to all component parts, is liable for the tax and not the person who buys, and assembles a taxable article from such component parts."

"Sec. 316.55. *Definition of Parts or Accessories.* The term 'parts or accessories' for an automobile truck or other automobile chassis or body, taxable tractor, or motorcycle, includes (a) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (b) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or orna-

mentation, and (c) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use.

"The term 'parts and accessories' shall be understood to embrace all such articles as have reached such a stage of manufacture that they are commonly or commercially known as parts and accessories whether or not fitting operations are required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles.

"Spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of automobile truck or other automobile chassis, taxable tractors, or motorcycles, are considered parts of or accessories for such articles whether or not primarily designed or adapted for such use."

STATEMENT OF FACTS MATERIAL HERETO.

This action was brought to recover excise taxes required by defendant to be paid by Petitioner under Sec. 3403 (c), *supra*, of the Internal Revenue Code, for the period Nov. 1, 1952, to March 31, 1955. Petitioner, a resident citizen of Tulsa, Oklahoma, paid the tax on August 1, 1955, filed claims for refund, the total amount being less than $10,000.00. On November 8, 1955, the Commissioner of Internal Revenue disallowed the claims, and on November 9, 1955, Petitioner filed this suit under Code Section 3772, 26 U. S. C. A. 3772.

After trial by the court without a jury, judgment was entered for the defendant (C. of A. R., p. 33) and the Court of Appeals affirmed the judgment of the District Court (Tr., p. 12).

Section 3403 (c) of the Code imposes an excise tax equivalent to 8% of the sale price upon automobile parts and accessories against "the manufacturer" of such parts or accessories. The requirement by defendant that petitioner pay these taxes was made on the theory that petitioner was the manufacturer of the second hand motor which he assembled and sold.

The material facts are not in dispute.

During the period involved Petitioner was engaged in the business of reworking second hand automobile motors.

Petitioner's reworking operations consisted of disassembling, cleaning and reassembling the old motor. In the reassembling process Petitioner replaced the completely worn out parts with new tax paid parts, and himself machining the partially injured parts.

An ordinary motor consists of 52 different kinds of parts (C. of A. R.-119), but Petitioner machines only four of these 52 kinds, namely the cylinder block, the crankshaft, the valves, and connecting rods.

For the purpose of this suit, Petitioner does not seek a refund of the tax on these four parts which he machines. However, the only machining performed is resurfacing of only the portions making contact with other portions in the moving or reciprocating operations. The cylinder walls of the motor block are rebored to a smooth surface, usually about 10/1000ths of an inch; the valve seats that are in the motor block are reground to a smooth surface, usually about 10/1000ths of an inch; the crankshaft journals are reground to a smooth surface, usually about 10/1000ths of an inch; and connecting rods are reground to about the same degree.

The second hand parts merely cleaned, the new parts purchased tax paid, and the used parts machined (on which a refund is not asked), 52 different kinds of parts in all, sufficient for a complete motor, come to petitioner's assembly department in a complete stage of manufacture, the same as if Petitioner had purchased a motor (consisting of exactly the same parts) in a knock down condition.

The tax refund sought is tax in excess of the tax which would be paid defendant had petitioner purchased the same motor in a knock down condition.

The tax to be retained by defendant is the same as the tax that would have been paid had the same parts been sold in separate sales, and other than in an assembled motor.

Defendant concedes that, as of the time the completed components reach petitioner's assembly department, it receives a tax on all components going into the assembled motor, the same as if such completed components were sold separately or the same as if a complete motor was sold in a knock down condition, but it insists that it is entitled under the statute to a tax on the labor and overhead cost in putting the complete components together. Defendant also concedes that if Petitioner purchased new motors in a knock down condition and merely put them together Petitioner would owe no tax.

Defendant concedes, however, that petitioner is entitled under the proviso in Sec. 3403 (c) to a credit for the tax paid on the new parts, as if petitioner was a manufacturer of a chassis under Sec. 3403 (b), but denies that Petitioner is entitled under Sec. 3443 (a) (1) to a credit for the tax paid by the original manufacturer on the second hand parts used in the assembled motor.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT, AND ARGUMENTS THEREUNDER.

First Reason and Arguments.

The Court of Appeals for the Tenth Circuit rendered a decision in the case at bar which conflicts with the decision of the Court of Appeals for the Ninth Circuit, in the case of *United States* v. *Armature Exchange, Inc.*, (9 Cir.) 116 F. 2d 969, on the question of the rule of law defining what constitutes "repair" and what constitutes "reconstruction" of a machine, or combination, as defined by this Court in *Wilson* v. *Simpson*, (9 How.) 13 L. ed. 66, 60 U. S. 109, and followed by the Circuit Courts in *Goodyear Shoe Machinery Co.* v. *Jackson*, (1901) 112 Fed. 146, 55 L. R. A. 692; *Foglesong Machinery Co.* v. *J. D. Randall Co.*, 239 Fed. 893; *Ely Norris Safe Co*, v. *Mosler Safe Co.*, (2 Cir.) 52 F. 2d 524; *Hess-Bright Mfg. Co.* v. *Bearings Co.*, (D. C. Pa.) 271 Fed. 350.

The Court of Appeals for the Ninth Circuit, in *United States* v. *Armature Exchange, Inc.*, sought to apply the same identical statute, as is involved in this case, namely Sec. 3403 (c), to a used "armature," a component of a generator, and being a single piece of material. The facts in that case found that the used armature had the same relation to a completed armature as unused material had to a completed armature.

The taxpayer in that case urged the "combination" rule, *supra* (last par., p. 970), but the Ninth Circuit rejected the contention on the ground that such rule was applicable to a "combination" not to an individual part.

All of the 52 different kinds of parts going into Peti-

tioner's motor were completed components at the time they were received at Petitioner's assembly department.

Components complete within themselves do not have the same relation to the ultimate product as unused material has to the ultimate product, *Tidewater Oil Co.* v. *United States*, 171 U. S. 108, 18 S. Ct. 837.

The Congress in enacting the Excise Tax Statute did not define "manufacturing," therefore, the *Wilson* v. *Simpson* rule is still the law regarding the determination of whether a combination is "repaired", or is "reconstructed."

We believe the Ninth Circuit acknowledged the authority of this Court by recognizing that the *Wilson* v. *Simpson* rule applied to "combinations" under the statute involved. The Tenth Circuit in this case rejected such rule as applicable to a combination under the statute involved in this case.

It is without doubt that if the *Wilson* v. *Simpson* rule is applicable to a combination under the statute involved, as stated by the Ninth Circuit, then the Tenth Circuit was in error.

This Court should grant this application and settle the conflict.

Second Reason and Arguments.

The Court of Appeals for the Tenth Circuit rendered a decision in the case at bar which conflicts with applicable decisions of this Court in *Indian Motorcycle Co.* v. *United States*, 51 S. Ct. 601, 283 U. S. 570; *Wilson* v. *Simpson*, (9 How.) 13 L. ed. 66, 60 U. S. 109; and *Tidewater Oil Co.* v. *United States*, 171 U. S. 108, 18 S. Ct. 837; in holding that

Petitioner's ultimate product, the assembled second hand motor, was in effect a new motor manufactured by Petitioner.

This Court held in the *Indian Motocycle Co* case that the tax under this statute applied only to the first sale. That was because the tax was against the sale by the manufacturer "thereof," meaning the sale by the manufacturer of the article. A tax against any sale other than the first sale would not be against the manufacturer.

It is our understanding that defendant has left the *Indian Motocycle* case in the rear, and we understand they say they no longer follow it.

The Tax Statute is substantially the same wording as it was when this Court wrote the opinion in the *Indian Motorcycle Co.* case, and this Court interpretation in the *Indian Motorcycle Co.* case should still be the law until the act is changed by Congress.

Petitioner's ultimate product is no more a new product than the motorcycle was in the *Indian Motorcycle Co.* case, nor the planing machine in *Wilson* v. *Simpson*.

Third Reason and Arguments.

The Court of Appeals for the Tenth Circuit rendered a decision in the case at bar by departing from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

The opinion rendered by the Tenth Circuit has the effect of writing regulations for the Treasury Department, rather than making a judicial interpretation of the meaning of the language employed in the act. This, of course, means judicial usurpation, and borders on the ground of legislating.

The Court falls into the error of flagrant discrimination with regard to the motor. The Treasury Department has made special rulings relating to second sales of (*a*) automobiles (second hand automobiles), (*b*) generators, (*c*) clutch assemblies, (*d*) water pumps, (*e*) windshield wiper motors, and other combinations. The generator ruling was promulgated into a regulation, but just prior to this trial it was withdrawn. (App. 25.) Each of these units are parts for automobiles, and to give an interpretation under Sec. 3403 (*c*) for one unit and a different interpretation for a different unit, under the same statute, certainly disregards Section 8 of Article 1 of the Constitution providing for uniformity of excise taxes.

The procedure for interpreting excise tax statutes was announced by this Court in *Hartranft* v. *Weigmann*, 121 U. S. 600, 7 S. Ct. 1243, and *Cadwalader* v. *J. & M. Paper Co.*, 149 U. S. 350, 13 S. Ct. 875.

The *Hartranft* case held that resurfacing by honing was not manufacturing, and that to constitute manufacturing a change of form or function must take place. That case further stated that if "cut" coral was to be treated as a manufacture, Congress must expressly say so.

The *Cadwalader* case held that to consider prior manufactures as raw material for a new manufacture such manufactures must lose its commercial value as prior manufactures.

The Tenth Circuit failed to follow this Court's rules, laid down in those cases.

In fact, the Tenth Circuit's opinion is contradictory within itself. For instance the very first sentence is contradictory, *e. g.*, "The plaintiff was engaged in the busi-

ness of reconditioning or rebuilding automobile motors for sale."

Petitioner's ultimate product cannot be both a "reconditioned" motor and a "rebuilt" motor. It must be one or the other, but it cannot be both. It is very clear that the Tenth Circuit did not take time to distinguish the meaning of "reconditioned" and "rebuilt."

The Tenth Circuit did not attempt to follow any regulation, as provided by Sec. 3450. Neither did the Tenth Circuit attempt to make an interpretation of the Act sufficiently to announce a definite rule which could be applied to any set of facts.

The Tenth Circuit simply said "me too" without making any judicial interpretation of its own, a procedure not commendable to any court independent in its existence.

Fourth Reason and Arguments.

The Court of Appeals for the Tenth Circuit in the case at bar decided an important question of federal law which has not been, but should be, settled by this Court.

This Court should take jurisdiction of this case so as to make an interpretation of the entire Act; setting out rules which can be applied as the Uniformity Clause provides.

In addition to making an interpretation of "manufacturing," a rule should be laid down with regard to the credits under Section 3443 (a) (1) to the tax previously paid on the second hand components that enter into the ultimate product.

Section 3443 (a) (1) provides that if an entity is a manufacturer of an ultimate product and purchases and

uses material in its manufactures the tax previously paid will be allowed as a credit, but the Commissioner of Internal Revenue will not allow this credit, neither would the Tenth Circuit, and although it said credits would be allowed, it did not allow such credits.

No regulations have been promulgated spelling out rules to determine the tax in these circumstances, but the Congress provided that the Treasury Department do so. 26 U. S. C. 3450

Neither have regulations been promulgated to determine whether or not merely putting parts together is manufacturing. This Court, in the *Tidewater Oil Co.* case, held that merely putting parts together was not manufacturing subject to drawbacks under an import duty.

The Tenth Circuit did not settle the state of confusion existing in the operation of this statute. Even subsequent to the Tenth Circuit's decision in this case on April 5, 1957, the Treasury Department on May 10, 1957, issued another ruling relating to repairing a second ~~hand automobile~~ which outlines a procedure precisely as we contended for in this case for the second hand motor. (App. 29.)

There has been more confusion in this statute than any other taxing statute we have ever heard of. In the first place the Treasury Department, after twenty-five years, has not promulgated regulations to take care of the statutes. In the next place the Treasury Department is seeking to make "pocket" rulings for specific units and refusing to permit such rulings to be applied to other units under the same statute. There are differences of opinion among departmental heads, and in many instances the courts refuse to follow the rulings and regulations that are in effect.

Among the cases refusing to follow the rulings are:

Martin Tire Co. v. United States, (D. C. S. D., Fla.) 130 F. Supp. 316, involving putting together components of a battery; no appeal;

Goede v. *Westover*, (D. C. S. D., Cal.) 45 A. F. T. R. 1275, involving putting together a water pump; no appeal;

Sealed Power Corp. v. *Kavanaugh*, (D. C. E. D. Mich.) 81 F. Supp. 459, involving a parts package less than a complete article; no appeal;

A. P. Bardet & Co. v. *United States*, (D. C. N. D. Cal.) 23 A. F. T. R. 1198, involving connecting rods; no appeal;

Con-Rod Exchange v. *Henrickson*, (D. C. W. D. Wash.) 28 F. S. 924, involving connecting rods; no appeal;

J. Leslie Morris Co. v. *United States*, (D. C. S. D. Cal.) 40-2 U. S. T. C. 9608, involving connecting rods; reversed on appeal;

Morology Bearing Service v. *United States*, (D. C. N. D. Cal.) 40-2 U. S. T. C. 9619, involving connecting rods; reversed on appeal;

Armature Rewinding Co. v. *United States*, (D. C. E. D. Mo.) 40-2 U. S. T. C. 9691; involving armatures for generators; reversed on appeal.

The above cases illustrate the need for this Court to take jurisdiction and settle the questions arising on the application of the statutes to these second hand articles.

CONCLUSION.

Wherefore, your Petitioner respectfully prays that a Writ of Certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the Tenth Circuit commanding that court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and of all proceedings in the United States Court of Appeals for the Tenth Circuit, had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the United States Court of Appeals for the Tenth Circuit be reversed; and that Petitioner be granted such other and further relief as may be proper.

R. F. ROBERTS,
420 Goodhue Building,
Beaumont, Texas,

S. J. GLENDINNING,
802 Ritz Building,
Tulsa, Oklahoma,
Attorneys for Petitioner.

I hereby certify that I have this the 26 day of June, 1957, served two copies of the above Application for Writ of Certiorari on Respondents by mailing one copy to Hon. B. Hayden Crawford, United States Attorney, Tulsa, Oklahoma, and one copy to Hon. Chas. K. Rice, Assistant Attorney General, Washington, D. C., Attorneys of Record for Respondent.

R. F. Roberts
R. F. ROBERTS.

APPENDIX.

Opinion.

(FILED: United States Court of Appeals, Tenth Circuit, Apr. 5, 1957; Robert B. Cartwright, Clerk.)

UNITED STATES COURT OF APPEALS,
Tenth Circuit.

No. 5445—March Term, 1957.

C. Ed. Hackendorf, d/b/a Sun Bearing Supply, Appellant,

vs.

United States of America, Appellee.

Appeal from the United States District Court for the Northern District of Oklahoma.

R. F. Roberts, Beaumont, Texas, (S. J. Clendenning, Tulsa, Oklahoma, was with him on the brief), for Appellant;

Earl E. Pollock, Washington, D. C., (Charles K. Rice, Assistant Attorney General, Lee A. Jackson, Robert N. Anderson, Walter Ackerman, Jr., Attorneys, Department of Justice, Washington, D. C., and B. Hayden Crawford, United States Attorney for the Northern District of Oklahoma, prepared the brief), for Appellee.

Before BRATTON, Chief Judge, and PICKETT and LEWIS, Circuit Judges.

PICKETT, Circuit Judge.

The plaintiff was engaged in the business of reconditioning or rebuilding automobile motors for sale. He brought this action to recover a manufacturers' excise tax alleged to have been erroneously assessed and collected under the

provisions of Sec. 3403(c) of the Internal Revenue Code of 1939, as amended, and Sec. 4061(b) of the Internal Revenue Code of 1954, during the period beginning November 1, 1952, through March 1955. This is an appeal from a judgment holding the sales were subject to the manufacturers' tax provided for in the statute.

Relying upon decisions distinguishing manufacturing or reconstruction from repair in other types of cases, plaintiff vigorously insists that he does no more than replace worn out automobile parts for the purpose of preserving the motors as a whole.[1] In other words, he says that by his process he replaces only worn out essential parts to preserve a machine which is a combination of parts. In applying the statutes, we think the contention is untenable.

The facts are not in dispute. During the period in question the plaintiff acquired old automobile motors which had ceased to function efficiently or to function at all. In some instances the motors were purchased from automotive salvage companies, but most of them were acquired through trade-in allowances from his wholesale customers when purchasing rebuilt motors. In the process of rebuilding, the motors were completely dismantled and the component parts thoroughly cleaned. The different parts were then inspected and placed in compartments containing parts from the same type and make of motors. The motor blocks, crankshafts, valves and connecting rods were machined with special equipment. Plaintiff's reworking operations consisted of resurfacing of the cylinder walls by reboring the block, resurfacing of the crankshaft journals, valves, valve seats and connecting rods with emery wheels and honing stones. There were new bearings in all motors. No attempt was made to replace salvaged parts in the same block from which they were taken. The parts were used on an

1. Typical of these cases are Wilson v. Simpson, et al., 50 U. S. 108; Hartranft v. Wiegmann, 121 U. S. 609, and General Motors Corp. v. Preferred Elec. & Wire Corp., 79 F. 2d 621, cert. den. 296 U. S. 655.

assembly line in the production of rebuilt motors.[2] When the motors were reassembled, parts which were worn to the extent that they were unusable were replaced by new parts upon which the tax had been paid. The finished product was sold at a fixed price for each model and the taxpayer gave a new motor warranty to the purchaser. The sales averaged 85 or 90 motors per month.

Section 3403 of the Internal Revenue Code of 1939, as amended, provides that "There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold: * * * (c) Parts or accessories

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2. As to plaintiff's process, the trial court made these findings:

"6. Sun completely disassembles the old engines that it acquires, cleans and degreases the various components, and then inspects those components to determine which are salvageable. Since Sun uses new pistons, new bearings, and timing chains in its rebuilt engines, those components of the old engine are invariably discarded. In addition the condition of any one or more of the other components of the old engine may be such as to require discard.

"7. Salvageable blocks, crankshafts, valves and, in most instances, connecting rods obtained by Sun from old engines are machined or rebuilt by Sun with specialized equipment to make them useable, as follows: The blocks are bored to give the cylinders a uniform size, the valve ports are refaced or reseated, and cracks in the block are cold welded. The crankshaft bearing surfaces are reground. Connecting rods for most of the rebuilt engines produced by Sun are reground. Valves are refaced. Other components of the engine, if salvageable at all, do not require machining before use.

"8. The parts salvaged by Sun from its old engines and the new parts purchased tax paid by Sun are placed in separate storage bins according to type. Sun then produces rebuilt engines on an assembly line utilizing salvaged parts and newly manufactured parts. Salvaged parts do not customarily go back into the engine block from which they may have originated.

"9. With the exception of the camshaft, and in some model engines, the connecting rods, every major component of Sun's rebuilt engines is either a newly manufactured part that has been purchased tax paid by Sun or is a salvaged part that Sun has machined in order to make useable.

"10. The rebuilt engines produced by Sun are a new and different article from the old engines which it has used as a source of salvageable parts."

(other than tires and inner tubes and other than radio or television receiving sets) for any of the articles enumerated in subsection (a) or (b), * * *.3' (Subsections (a) and (b) refer to automobiles.) Section 4061 of the 1954 Internal Revenue Code is to the same effect. Section 316.4 of Treasury Regulation 46, (1940 Ed.), defines a manufacturer to include "a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles. Administrative rulings are to the same effect."

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3. Treasury Rev. Rul. 54-329, 1954-2 Cum. Bull. 405, defined a "manufacturer" as a person who was engaged in the production of rebuilt auto parts or accessories for sale or for use in further manufacture of other articles for sale, as follows:

"(2) *Rebuilding.*—Reboring or other machining, rewinding, and comparable major operations performed on used parts being processed for sale or for use as components of other articles for sale are defined as rebuilding operations constituting manufacture for purposes of the tax. The person owning parts being rebuilt for such disposition is the rebuilder (manufacturer) and is liable for the tax on his sales of the rebuilt parts or on their use as components of other articles manufactured by him for sale. The tax applies whether the machining, etc., operations are performed by the rebuilder himself or by some other person in his behalf.

"The manufacturers' excise tax applies to the rebuilder's sale of (a) rebuilt batteries, (b) rebabbitted or machined connecting rods, (c) resurfaced clutch plates, (d) rewound armatures, (e) reground or remetalized crankshafts, (f) engines in which blocks are machined (e.g., cylinders rebored, new sleeves inserted, with or without cylinders being rebored) or new blocks installed, and (g) similar parts on which machining, rewinding, or comparable operations are performed.

"The tax due upon the sale of a rebuilt part is based upon the price for which such part is sold, excluding the value of a like part accepted in exchange. The tax due on the use of a rebuilt part as a component of another article manufactured by the rebuilder for sale is based upon the price for which such or similar rebuilt parts are sold in the ordinary course of trade, excluding the value of a like part accepted in exchange. Where a taxpaid part is used as a component in the manufacture of the rebuilt part, appropriate relief through refund or credit may be obtained pursuant to the provisions of section 3443 (a) (1) of the Code."

The courts have generally held that rebuilding automobile parts such as armatures, generators, and connecting rods for sale constitutes manufacturing within the meaning of the statute, and sales of the rebuilt products are subject to the manufacturers' tax. Clawson & Bals v. Harrison, 7 Cir., 108 F. 2d 991, cert. den. 309 U. S. 685; United States v. Armature Exchange, 9 Cir., 116 F. 2d 969, cert. den. 313 U. S. 573; United States v. J. Leslie Morris Co., 9 Cir., 124 F. 2d 371; United States v. Moroloy Bearing Service of Oakland, Ltd., 9 Cir., 124 F. 2d 373; United States v. Armature Rewinding Co., 9 Cir., 124 F. 2d 589; Clawson & Bals v. United States, 7 Cir., 182 F. 2d 402, cert. den. 340 U. S. 883[4]; Monteith Bros. Co. v. United States, 7 Cir., 142 F. 2d 139; Broad Motors Co. v. Smith, 86 F. Supp. 4. There is no material difference in the rebuilding of armatures, generators, and connecting rods, and in rebuilding motors. Each is made up of component parts which are reworked

4. In the case of Clawson & Bals v. United States, 182 F. 2d 402, 405, the court said:

"The plaintiff contends that its reconditioning of these rods did not amount to 'rebuilding' but only to 'repairing.' The Merriam-Webster New International Dictionary defines 'rebuild' as 'to build again or to construct anew, usually the parts that are in good condition and some new parts being used.' The reconditioning done by plaintiff would seem to fit this definition. Plaintiff's attempt to distinguish between 'rebuilding' and 'repairing' was not convincing. The dictionaries give 'repair' as one of the synonyms of 'rebuild.' We think the common use of 'rebuild' is the making of such extensive repairs on an object as to make it again useful for a period, almost as if it were new.

"However, regardless of the exact definition of 'rebuild,' the above quotation from the Senate Finance Committee had reference to the very type of reconditioning we are here considering. They there called such reconditioned parts 'rebuilt' parts and said they should be subject to the same tax as new parts.

"This statement by the Senate Finance Committee is significant. It discloses that the attention of Congress had actually been called to some of the cases which we have cited above and that Congress had accepted these decisions as correctly interpreting the Congressional intent on this matter. This constitutes Congressional ratification of the interpretation of this Section by the courts and should be considered just as binding on the courts as if such reconditioned parts were expressly included in the Act."

er replaced when necessary. The end product in either case is a finished part of an automobile ready for installation. Furthermore, it appears that Congress expressly recognized that rebuilt automobile parts are subject to the manufacturers' tax by refusing to exempt specifically such rebuilt parts. In considering the Revenue Bill of 1941, the Senate Finance Committee reported as follows:

> "It was urged that this section be amended to specify that repaired, reconditioned, and rebuilt automobile parts and accessories are not subject to the 'parts and accessories' tax. Your committee examined the problem very carefully. Repaired and reconditioned parts are not now subject to tax. There are several decisions of the United States circuit courts of appeals holding rebuilt parts and accessories to be subject to the manufacturers' tax. Rebuilt parts compete with new parts, and it appears appropriate that they should be subject to the same tax. Accordingly, no change has been made."—S. Rep. No. 673, Part 1, 77th Cong., 1st Sess., p. 48.

Automobile motors, whether new or rebuilt, are single functional units and are usually sold as such for installation in motor vehicles. They are a necessary "part" of an automobile and taxable if manufactured and sold. It is unimportant that they may be made up of component parts which are subject to the tax if sold separately. The statute provides that if taxable component parts are used in manufacturing or producing a taxable part, a credit shall be allowed.

Judgment affirmed.

Generator Ruling.

U. S. TREASURY DEPARTMENT
Washington 25

Office of
Commissioner of Internal Revenue
Refer to: T:R;ExS MS September 10, 1954

Halfpenny & Hahn
111 West Washington Street
Chicago 2, Illinois

Attention: Mr. Richard F. Hahn

Gentlemen: This is in reply to your letter dated May 26, 1954, in which you request a ruling in connection with the applicability of the manufacturers' excise tax imposed under section 3403(c) of the Internal Revenue Code to certain operations performed upon automobile parts being processed for sale.

In your first question you request advice as to whether the following operations are considered to be reconditioning or a major operation comparable to reboring, machining or rewinding, and constitute rebuilding.

"(a) Honing of engine, shock absorber, brake or windshield-wiper cylinders;

"(b) Reaming of such cylinders;

"(c) Filing of armature commutators;

"(d) Insertion of tax-paid pre-formed coils in armatures?"

The operations listed under (a), (c) and (d) are not considered to be rebuilding operations. The tax imposed under section 3403(c) of the Code does not attach to sales of the articles listed which are re-conditioned in such manner.

With respect to (b), the reaming of the cylinders is considered to be a rebuilding operation. The rebuilder who rebuilds in such manner cylinders owned by him, is liable for tax on his sale of such rebuilt parts or on his use of such rebuilt parts as components of other articles manufactured by him for sale.

With respect to question (a)* under 2, the A Company would be liable for tax only on its use of the rewound armature as a component of another article which it sells. The tax is to be based on the price for which similar rewound armatures are sold by it at wholesale. Under (b)*, the B Company does not incur any liability for tax upon the sale of the generators where it purchases "rebuilt" armatures and reassembles such armatures with the other components of the generators which have been merely disassembled and cleaned.

Very truly yours,

/s/ R. J. Bopp
Chief, Excise Tax Branch

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*NOTE: Questions (a) and (b) under 2, read:

"(a) The A Company sells used generators upon which the following operations are performed by it. The armatures are 'rebuilt' by rewinding. The other components are merely disassembled, cleaned and reassembled (with necessary replacement of worn parts with tax-paid parts). Upon sale of the generator, is the tax based upon the price of the 'rebuilt' armature, or of the entire generator consisting of a 'rebuilt' armature and 'reconditioned' other components?

"(b) The B Company sells used generators. It purchases tax-paid 'rebuilt' armatures and reassembles the same with other components which have been merely disassembled and cleaned. Does B Company incur any liability for tax upon the sale of such generators? If so, based upon the price of what?"

Amplification of Generator Ruling.

SECTION 3403.—TAX ON AUTOMOBILES, ETC.

Regulation 46, Section 316.4: Who is a Manufacturer. Rev.Rul.55-98

(Also Section 316.55; Section 3444, Section 316.7.)

In the "reconditioning" of a used generator, which requires the replacement of the armature with one that has been rewound by the person restoring the generator to useful condition for sale, a manufacturing or "rebuilding" operation is performed on the armature only, and the tax is computed upon the established selling price of the armature component.

Revenue Ruling 54-329, I.R.B. 1954-33,12, amplified.

Advice has been requested concerning the method of determining the tax due when a "rebuilt" armature is used in "reconditioning" a generator for sale (including exchange).

An automobile shop operates a generator exchange service. A generator accepted in an exchange is disassembled and cleaned, the armature is rewound or replaced with a previously rewound armature, and the generator is then reassembled, repainted, and placed in stock for subsequent exchange. The exchange price of such a generator is $10, while the established exchange price of a rewound armature is $1.50.

In the instant case the rewinding of the armature constitutes a "rebuilding" operation on a part which is then used as a component in the "reconditioning" of the generator. The tax should be based, therefore, upon the estab-

lished selling price of such a "rebuilt" armature, namely $1.50, excluding the value of a like part accepted in exchange.

Revenue Ruling 54-329, supra, amplified.

2/21/55
I. R. B. 1955 - 8, 29

Clutch Ruling.

U. S. TREASURY DEPARTMENT
Washington 25

Office of
Commissioner of Internal Revenue
Refer to: T:R:ExS MS October 11, 1954

Halfpenny & Hahn
111 West Washington Street
Chicago 2, Illinois

Attention: Mr. Richard F. Hahn

Gentlemen: This is in reply to your letter dated September 22, 1954, in which you request a ruling as to the applicability of the tax imposed under section 3403(c) of the Internal Revenue Code of 1939, to sales of used clutch pressure plate assemblies in the two questions set forth below:

"1. The A Company sells used clutch pressure plate assemblies (each unit consisting of a pressure plate, levers, springs, bolts, nuts and housing), upon which the following operations are performed by it. The pressure plates are 'rebuilt' by regrinding the faces thereof. The other components are merely disassembled, cleaned and reassembled (with necessary replacement of worn parts with tax-paid parts). Upon sale of such a clutch pressure plate assembly, is the tax based upon the price for which the 'rebuilt' pressure

plate is sold in the ordinary course of trade as wholesale, or upon the price of the entire assembly consisting of a 'rebuilt' pressure plate and 'reconditioned' other components?"

The A Company is liable for the tax imposed under section 3403(c) of the Code on its sales of the reground or resurface clutch plates. The tax is to be based on the price for which the rebuilt pressure plates are sold by it in the ordinary course of trade at wholesale. No tax attaches to the sale by the A Company of the used pressure plate assemblies.

"2. The B Company sells used clutch pressure plate assemblies. It purchases tax-paid pressure plates, either new or 'rebuilt,' and reassembles the same with the other components of the assemblies which it has merely disassembled and cleaned. Does B Company incur any liability for tax upon the sale of such assemblies?"

The B Company incurs no liability for tax under section 3403(c) of the Code on its sale of the used clutch pressure plate assemblies.

Very truly yours,

/s/ R. J. Bopp
Chief, Excise Tax Branch

Second Hand Auto Ruling.

T:R:ExS
LaC

Apr 10 1957

Mr. Tom DeWitt
5621 Washington Boulevard
Houston, Texas

Dear Mr. DeWitt: We are in receipt of a letter from Mr. Seymour Lieberman of your city, inquiring whether the

manufacturers excise tax on automobiles, etc., imposed by section 4061(a) of the Internal Revenue Code of 1954, applies to used cars which are repaired and sold by you. The nature of repairs which you make to the vehicles is described in his letter. Mr. Lieberman's letter was transmitted to this office by letter from Mr. Charles M. Trammell of the law firm of Trammell, Hand and Nathan of this city.

The manufacturers excise tax does not apply to the second sale of a vehicle taxable under section 4061(a) of the Code. In view thereof, your sales of used cars are not subject to the tax.

Section 4061(b) of the Code imposes upon parts or accessories (other than tires and inner tubes and other than automobile radio and television receiving sets) for any of the vehicles taxable under section 4061(a) sold by the manufacturer, producer, or importer a tax equivalent to 6 per cent of the price for which so sold. Attention is invited to the fact that liability to the tax is incurred by the person who sells an automobile part or accessory taxable under section 4061(b) of the Code for repair or replacement purposes. In view thereof such articles may not be purchased by you tax-free. Liability is likewise incurred by you on taxable parts or accessories which are manufactured by you for incorporation in the used cars.

Our reply is made directly to you inasmuch as the records of this office do not disclose that a power of attorney authorizing either Mr. Lieberman or Mr. Trammell to represent you has been filed with this Service.

Very truly yours,

(Signed) R. J. Bopp
Chief, Excise Tax Branch

LAChance:mmp-4-5-57
cc: DD:Audit:Austin
cc:ARC:Audit-Dallas

Office Supreme Court, U.S.
FILED
SEP 3 1957
JOHN T. FEY, Clerk

No. 244

In the Supreme Court of the United States

October Term, 1956.

C. ED HACKENDORF, *d/b/a* SUN BEARING SUPPLY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Reply to the Brief for the United States in Opposition

R. F. ROBERTS,
420 Guaranty Building,
Beaumont, Texas,

S. J. CLENDENNING,
502 Biltz Building,
Tulsa, Oklahoma,
Attorneys for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1956.

No. 244

C. ED HACKENDORF, *d/b/a* SUN BEARING SUPPLY,
Petitioner,

vs.

UNITED STATES OF AMERICA, - - - - - *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION.

Reply to Respondent's Statement of the Question Presented.

Respondent's statement that the question presented is whether the District Court and the court below erred in holding that, in the circumstances of the case, the taxpayer's sale of his automobile engine is the sale of an automobile part within the meaning of the statute, is, of course, not true. The question as to whether or not the motor as such is an automobile part is neither raised in the pleadings nor the claim for refund.

The basis of the tax is, of course, the sale price, or the reasonable market value. The tax accrues at the time of the sale or at the time of the use.

Neither the sale price, or the market value, nor the event of the sale determines the taxability.

The taxability issue rests entirely upon whether petitioner is the manufacturer of what he sells or uses.

Petitioner states in paragraph 9 of his original complaint the following:

> "Plaintiff does machine, or 'rebuild,' some of the old used parts, as alleged in subparagraph (a) of paragraph No. 6, above, and, for the limited purpose of this suit, admits a tax is due under the 1939 Code * * * upon his sale of, or his use as components of: (here mentioned parts machined)."

In his claims for refund Petitioner states:

> "The tax is limited to the sale price of only the old used parts reworked, or machined, by taxpayer. The tax does not apply to subsequent sales by taxpayer, a purchaser of new automobile parts, purchased tax paid by him, from other manufacturers. The putting together by taxpayer of new automobile parts complete in themselves purchased tax paid, with old parts machined by him, which are also complete with themselves, and on which he paid the tax, does not result in another and different taxable article."

Petitioner is engaged in several activities. He buys and sells new parts; he resurfaces, by machining, the old parts partially worn; and he disassembles, cleans and reassembles old motors.

The buying and selling, or buying and using, of new parts, taken alone, does not incur the tax. Neither does the disassembling, cleaning and reassembling, taken alone, incur the tax.

After conceding, for the limited purpose of this suit, that machining a few of the specific partially worn parts is taxable, does such machining of such partially worn parts render all activities taxable which would not be taxable but for the machining.

Petitioner's theory is that he would pay the tax on the components, or particular parts, machined, whether sold or used in reassembling, that is, he would pay a tax on the increment in value resulting from his machining operation.

Petitioner's further theory is that he would owe no tax on the mere re-assembly and sale of a second-hand motor, since there would be no increment in value resulting from his assembly operations. (This is clearly recognized by the last paragraph of Article 4.)

Under Petitioner's theory Respondent would receive a tax on all new manufacturing.

Reply to Respondent's Arguments.

The difficult task involved in this case is determining what rule of law to use to define "manufacturer" or "manufacturing."

Congress, in enacting the statute, in 1932, did not define "manufacturer" or "manufacturing."

The meaning of words in a congressional enactment, when Congress does not otherwise indicate, is the ordinary meaning, or the meaning used in common speech. *United States* v. *Safety Car Heating & Lighting Co.*, (N. J., 1936) 56 S. Ct. 353, 297 U. S. 88, 80 L. ed. 500, reversing 76 F. 2d 133; *Union Trust Co. of Pittsburgh* v. *Commissioner of Internal Revenue*, (C. C. A., 1940) 115 F. 2d 86, cert. den., 61 S. Ct. 741, 312 U. S. 700; *Merchants Loan & Trust Co.* v. *Smietanka*, 41 S. Ct. 386, 255 U. S. 509; *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179, 185, 38 S. Ct. 467; *Eisner* v. *Macomber*, 252 U. S. 189, 206, 207, 40 S. Ct. 189.

The Third Circuit in *Union Trust Co. of Pittsburgh* stated:

> "The courts, unless Congress orders otherwise, fall back upon old friend 'ordinary meaning'."

This Court, in *Merchant's Loan & Trust Co. v. Smietanka*, stated:

> "In determining the definition of the word 'income' thus arrived at, this Court has consistently refused to enter into the refinements of lexicographers or economists, and has approved, in the definitions quoted, what it believed to be the commonly understood meaning of the term which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution."

The case of *Wilson v. Simpson*, 13 L. ed. 66, 60 U. S. 109, heavily relied on by Petitioner, spelled out a definition, at general law, of "reconstruction" as well as the antithesis thereof, namely "repair." The Congress did not define "repair" or "reconstruction" in the patent statute involved, and the courts then were privileged to rely upon the meaning at general law. This Court, after defining the words "reconstruction" and "repair" at general law, then applied the patent statute involved. The definition by this Court in *Wilson v. Simpson* is not limited to patent cases. Such definition is the commonly understood meaning of the words wherever used.

The same should be true here. Congress having failed to define "manufacturer" or "manufacturing," in Section 3403 (c), the courts are privileged to look to the general law for such definition. After determining the definition of "manufacturer" and "manufacturing" at general law then, and only then, can Code Section 3403 (c) be applied to the facts of this case.

This Court in *Tidewater Oil Co.* v. *United States*, 171 U. S. 108, 18 S. Ct. 837, gave five examples of putting completed components together, and held that putting them together did not constitute manufacturing.

The Supreme Court of Louisiana in *Brooklyn Cooperage Co.* v. *City of New Orleans*, 17 So. 804, held that putting components together was not manufacturing.

In the case at bar, the Petitioner's operations are either filing, grinding or cutting (*Wilson* v. *Simpson*); Petitioner only removes material from the original part, and never adds new material. The weight of authority in this country holds that this is the dividing line between repair and reconstruction. *Micromatic Hone Corp.* v. *Mid-West Abrasive Co.*, 177 F. 2d 934, 938.

The line of cases relied upon by the Tenth Circuit, and cited by Respondent herein, is that which begins with *Clawson & Bals* v. *Harrison*, (7th Cir.) 108 F. 2d 991. This case cites as authority the Canadian case of *Biltrite Tire Co.* v. *The King*, 1937 Canada Law Rep. 364. Each of these cases would fall in that class where material was added to the original article, and not in the class of merely filing, grinding and cutting, as in the case at bar.

However that may be, these cases relied upon by the Tenth Circuit express what the Canadian people think and not what the people of the United States thought at the time Code Section 3403 (c) was enacted.

It has never before been held, in construing statutes enacted by our Congress, that the meaning of the words used in the Acts of Congress should be governed by the meaning placed on those words by the British people, in lieu of the meaning placed on these same words by the people who adopted the Constitution. On this subject, this Court

in *Merchants' Loan & Trust Co.* v. *Smietanka, supra,* stated:

> "The British income tax decisions are interpretations of statutes so wholly different in their wording from the acts of Congress which we are considering that they are quite without value in atriving at the construction of the laws here involved."

At the time the Code was enacted in 1932, no evidence was given on the matter of "repair" or "reconstruction." However, in 1941 the question was brought to the attention of the Senate Committee on Finance, composed of Senators Taft, George, Connally, and others. After hearing evidence that committee refused to change the "ordinary meaning" of the words "repair" and "reconstruction," thereby leaving the definitions existing at general law in effect.

Senators Taft and Connally, in 1941, considered that only the particular part reworked was considered. Senator Taft stated:

> "Senator Taft (interposing): I do not care what the business or the trade does with it, but the important question is the work that is done on the old part."

Senator Connally stated:

> "Senator Connally: Do they tax them just on the cost of the particular part that goes into the repairs?"

The Senate Committee on Finance in 1951 in eliminating the value of the old part from tax stated:

> "Only the value added in this case could be considered as new manufacturing, since in effect the car owner already owned the old part."

The Tenth Circuit made no distinction whatsoever between an individual part and a "combination." In doing so

it is in conflict with the 9th Circuit in *United States* v. *Armature Exchange, Inc.*, 116 F. 2d 969, with the 6th Circuit in *Micromatic Hone Corp.* v. *Mid-West Abrasive Co.*, 177 F. 2d 934, 938, and with this Court in *Wilson* v. *Simpson*, and *Tidewater Oil Co.* v. *United States*.

We do not believe that the statute involved can be applied to the facts of the case until a definition is settled upon spelling out the meaning of the words involved, and that the definition spelled out should be applicable to all parts and combinations under the statute. Respondent's Treasury Department has made one definition for a generator combination, and another definition for a motor combination. Such, we think, is unconstitutional, and should render the entire act void. A generator dealer should not be given preference over a motor dealer. Respondent is guilty of doing just that.

We think this Court should take jurisdiction and settle the question involved.

Wherefore, Petitioner prays as he has heretofore prayed in his Petition.

R. F. ROBERTS,
420 Goodhue Building,
Beaumont, Texas,

S. J. CLENDINNING,
802 Ritz Building,
Tulsa, Oklahoma,
Attorneys for Petitioner.

CERTIFICATE OF SERVICE.

I hereby certify that I have this the . . day of August, 1957, served two copies of the above Reply to the Brief for the United States in Opposition by mailing one copy to Hon. B. Hayden Crawford, U. S. Attorney, Tulsa, Okla., and one copy to Hon. Chas. K. Rice, Assistant Attorney General, Washington, D. C., Attorneys of Record for Respondent.

. . . . . ,

R. F. ROBERTS.

Office Supreme Court, U.S.
FILED
AUG 1 1957
JOHN T. FEY, Clerk

No. 244

In the Supreme Court of the United States

OCTOBER TERM, 1957

C. ED HACKENDORF, D/B/A SUN BEARING SUPPLY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
JOHN N. STULL,
ROBERT N. ANDERSON,
FRED E. YOUNGMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

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Sec. 4062(b) (26 U.S.C. 1952 ed., Supp. IV, Sec. 4062(b))	8

Miscellaneous:

Rev. Rul. 54-329, 1954-2 Cum. Bull. 405	7, 9, 18
Rev. Rul. 56-189, 1956-1 Cum. Bull. 503	12, 22
S. Rep. No. 781, 82d Cong., 1st Sess., p. 99 (1951-2 Cum. Bull. 458, 529)	8, 23
Treasury Regulations 46:	
Sec. 316.4	7, 9, 16
Sec. 316.55	7, 17

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 244

C. ED HACKENDORF, D/B/A SUN BEARING SUPPLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 19-24) is reported at 243 F. 2d 760. The District Court did not render an opinion. Its findings of fact and conclusions of law. (R. 29-32)[1] are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered April 5, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

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[1] Record references herein are to the printed record filed in the Court of Appeals.

QUESTION PRESENTED

The taxpayer is engaged in the business of rebuilding automobile engines and selling them at wholesale to jobbers and others. In the course of his rebuilding operation he acquires old engines which have ceased to function efficiently; these engines are completely dismantled; the most important of the salvaged components are machined to make them usable; these components are then used with other salvaged components and newly-purchased tax-paid components in the production of rebuilt motors on an assembly line basis. The question presented is whether the District Court and the court below erred in holding that, in the circumstances of the case, the taxpayer's sale of an automobile engine completely rebuilt in this manner is the sale of an automobile part within the meaning of Section 3403(c) of the Internal Revenue Code of 1939 and Section 4061(b) of the Internal Revenue Code of 1954, so as to require the imposition of the manufacturer's excise tax upon the sale price (with appropriate credits for any taxes paid by the taxpayer on any newly purchased components used in the rebuilt engines).

STATUTES AND OTHER AUTHORITIES INVOLVED

The following pertinent statutory provisions and other authorities involved are printed in the Appendix, *infra*, pp. 13-24:

Internal Revenue Code of 1939, Sec. 3403(a), (b) and (c)

Excise Tax Reduction Act of 1954, Sec. 601(a)

Internal Revenue Code of 1954, Sec. 4061(a) and (b)

Treasury Regulations 46 (1940 ed.), Secs. 316.4 and 316.55
Rev. Rul. 54-329
Rev. Rul. 56-189
S. Rep. No. 781, 82d Cong., 1st Sess.

STATEMENT

This suit was brought to recover amounts alleged to have been erroneously or illegally collected from the taxpayer as manufacturer's excise tax under Section 3403(c) of the Internal Revenue Code of 1939 and Section 4061(b) of the Internal Revenue Code of 1954 for each of the months of November 1952 to and including March 1955 in the aggregate amount of $8,157.66. (R. 1-6.)

The taxpayer states that the material facts are not in dispute (Pet. 8), but does not state in full what the facts are. Since the correctness of the judgments below depends upon the facts of this particular case, they are here restated substantially as found by the District Court (R. 29-32.)

Taxpayer is and has been the sole proprietor of an unincorporated business known as Sun Bearing Supply (hereinafter "Sun"), whose principal place of business is located in Tulsa, Oklahoma. Since 1947 Sun has been engaged in the business of rebuilding automobile engines (or motors) and selling them at wholesale to jobbers and others. (R. 29.)

An automobile engine is a single functional unit, and both new and rebuilt engines are regularly sold as a single assembled unit for installation as replacements in a motor vehicle. The largest and most costly component of an automobile engine is the block, a casting containing the cylinders and, in some models, the ports

in which the valves are seated. All other components of the engine fit into or are attached to the block. The other principal components of the engine are the crankshaft, the pistons (one for each cylinder), the connecting rods (one for each piston), the camshaft, the valves (two for each cylinder), and the crankshaft, camshaft and connecting rod bearings. (R. 29.)

To produce its rebuilt engines, Sun uses newly manufactured parts that it has purchased tax-paid and other parts that it has salvaged from old engines owned by it. Sun acquires some of these old engines by purchase from automobile salvage companies, but acquires most of its old engines by giving a trade-in allowance or credit against the purchase price of its rebuilt engines if its wholesale customer turns in an old engine capable of being rebuilt. The old engines acquired by Sun are engines that, because of wear or for other reasons, have ceased to function efficiently or have ceased to function at all. Sun completely disassembles the old engines acquired by it, cleans and degreases the various components, and then inspects those components to determine which are salvageable. Since Sun uses new pistons, new bearings, and timing chains in its rebuilt engines, those components of the old engines are invariably discarded. In addition, the condition of any one or more of the other components of the old engines may be such as to require discard. (R. 29-30.)

Salvageable blocks, crankshafts, valves, and, in most instances, connecting rods obtained by Sun from old engines are machined or rebuilt by Sun with specialized equipment to make them useable, as follows: The blocks are bored to give the cylinders a uniform size, the valve ports are refaced or reseated, and any cracks in the

block are cold welded. The crankshaft bearing surfaces are reground. Connecting rods for most of the rebuilt engines produced by Sun are reground. Valves are refaced. Other components of the engine, if salvageable at all, do not require machining before use. (R. 30.)

The parts salvaged by Sun from its old engines and the new parts purchased tax-paid by Sun are placed in separate storage bins according to type. Sun then produces rebuilt engines on an assembly line utilizing salvaged parts and newly manufactured parts. Salvaged parts do not customarily go back into the engine block from which they may have originated. With the exception of the camshaft, and in some model engines the connecting rods, every major component of Sun's rebuilt engines is either a newly manufactured part that has been purchased tax-paid by Sun or is a salvaged part that Sun has machined in order to make useable. (R. 30.)

The rebuilt engines produced by Sun are a new and different article from the old engines which it has used as a source of salvageable parts. (R. 31.)

Taxpayer filed manufacturer's excise tax returns for the taxable periods involved, paying taxes computed on the basis of the sale price of his rebuilt engines, and taking an appropriate credit for taxes paid on any newly manufactured parts that had been purchased and used in the rebuilt engines. The ground for recovery asserted in the refund claims on which this suit was based was that an automobile engine is not a taxable "part" within the meaning of the applicable statute because the components of the engine constituted taxable "parts" in themselves and their assembly into a larger unit, the engine, did not create

another and different taxable article. These refund claims asserted that the excise tax should not be computed on the basis of the sale price of the rebuilt engine with credit for newly manufactured tax-paid parts, but should be computed on the basis of the "sales price" of those components of the engine that had been machined by the taxpayer. Each claim for refund contained a schedule purporting to show the "sales price" of the machined components. For example, on these schedules, it was claimed that a rebuilt Plymouth engine should be taxed on the basis of a sale price of $15.60, although the taxpayer sells a rebuilt Plymouth engine for $114.50 if an old engine is turned in by the customer, and charges an additional $35 if an old engine is not turned in. (R. 31.)

On the basis of the foregoing findings, the District Court concluded that the sale of a completely assembled automobile engine is the sale of an automobile "part" within the meaning of the applicable statutes; that the rebuilding of automobile engines by the taxpayer from newly manufactured parts and from salvaged parts, the most important of which are machined to make them useable, constitutes manufacture and the taxpayer is a manufacturer of automobile engines within the meaning of the applicable statutes; and that the manufacturer's excise tax is therefore payable on the sale price of these manufactured articles with appropriate credits against the tax so computed for any taxes paid on newly manufactured components contained in the rebuilt engines. (R. 32.)

The Court of Appeals unanimously affirmed the District Court's judgment. (Pet. 19-24.)

ARGUMENT

The concurrent decisions of the District Court and the Court of Appeals are clearly correct. The case turns upon its particular facts. There is no conflict, and no occasion for further review.

1. In his refund claims and in the court below, although conceding his tax liability on the value of the salvaged parts machined by him, the taxpayer took the position that the rebuilt automobile engines sold by him were not automobile "parts", and also that he was not a "manufacturer" within the meaning of the statutes.[2] (R. 31-32.) Both contentions were rejected. (R. 32; Pet. 19-24.)

From the questions posed by the petition (Pet. 2-3), and the reasons urged for granting the writ (Pet. 10-16), it appears that the taxpayer is no longer contending, at least not directly, that rebuilt automobile engines are not automobile "parts" within the meaning of the statutes,[3] thus presenting only the question

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[2] Internal Revenue Code of 1939, Section 3403(c); Internal Revenue Code of 1954, Section 4061(b); Treasury Regulations 46 (1940 ed.), Sections 316.4 and 316.55; Rev. Rul. 54-329. (Appendix, *infra*, pp. 14-15, 16-22.)

[3] That a completely assembled rebuilt automobile engine, when sold separately as a replacement, is an automobile "part", and a most important part at that, within the meaning of the statutes, seems clear both in reason and by judicial determination. In addition to the decisions below, see *Broad Motors Co.* v. *Smith*, 86 F. Supp. 4 (E.D. Pa.); *Hartley* v. *United States* (S.D. Tex.), decided October 29, 1956, 1956 C.C.H., par. 10,064, now pending on appeal in the Fifth Circuit. And compare *Clawson & Bals* v. *Harrison*, 108 F. 2d 991 (C.A. 7th), certiorari denied, 309 U.S. 685; *Monteith Bros. Co.* v. *United States*, 142 F. 2d 139 (C.A. 7th); *Clawson & Bals* v. *United States*, 182 F. 2d 402 (C.A. 7th); *United States* v. *Armature Rewinding Co.*, 124 F. 2d 589 (C.A. 8th); *United States* v. *Armature Exchange*, 116 F. 2d 969 (C.A. 9th), certiorari denied, 313 U.S. 573; *United States* v. *J. Leslie Morris Co.*, 124 F. 2d 371 (C.A. 9th); *United States* v. *Moroloy Bearing Serv-*

whether he was a "manufacturer" of the rebuilt engines which he sold and on which he paid the tax.[4] More specifically, since the taxpayer continues to concede his tax liability on the value of the salvaged parts machined by him (Pet. 8), it is apparently the taxpayer's contention that he should not be deemed a "manufacturer" with respect to the other operations involved in the rebuilding process.

The taxpayer states that during the period involved he merely "was engaged in the business of reworking second hand automobile motors"; that his "reworking operations consisted of disassembling, cleaning and re-

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ice, 124 F. 2d 373 (C.A. 9th); *Niagara Motors Corp.* v. *McGowan*, 45 F. Supp. 346 (W.D. N.Y.); *Replacement Unit Co.* v. *United States* (N.D. Ohio), decided December 17, 1941 (30 A.F.T.R. 1523).

[4] The taxpayer apparently seeks to inject a further question, not raised in his refund claims (R. 133) or in his complaint (R. 1-6), as to whether he should also be given a tax credit under Section 3443(a)(1) of the 1939 Code with respect to salvaged parts used in his rebuilt engines which did not require machining, suggesting this as one of the reasons for granting the writ because the Commissioner has promulgated no regulations "spelling out rules to determine the tax in these circumstances" (Pet. 14-15). Presumably such salvaged parts never were taxed separately, but were component parts of a complete engine which originally had been sold as a unit or of an engine in an automobile which originally had been sold as a unit. The statute makes no provision for a tax credit in such a situation. All Section 3403(c) of the 1939 Code and Section 4062(b) of the 1954 Code provide is that in determining the sale price of a rebuilt automobile part or accessory on which the tax is computed there shall be excluded from the price the value of a like part or accessory accepted in exchange. (See S. Rep. No. 781; 82d Cong., 1st Sess., p. 93, Appendix, *infra*, pp. 23-24.) Furthermore, if the taxpayer should be entitled to a tax credit with respect to such salvaged parts, it would seem that he also should be entitled to a similar tax credit with respect to salvaged parts machined by him. Compare *Broad Motors Co.* v. *Smith*, 86 F. Supp. 4 (E.D. Pa.). Yet in claiming and suing for refund the taxpayer admits liability for tax with respect to those salvaged parts (R. 4-5; Pet. 8).

assembling the old motor"; and that in the "reassembling process" the taxpayer "replaced the completely worn out parts with new tax paid parts, and himself machining the partially injured parts." (Pet. 8.) On the basis of this statement—completely at variance with the District Court's findings—taxpayer here seeks a ruling that he was simply engaged in repairing or assembling automobile engines.[5] But the taxpayer's operations as detailed in the District Court's findings (R. 29-32) are not susceptible of any such characterization. See Treasury Regulations 46 (1940 ed.), Sec. 316.4, and Rev. Rul. 54-329 (Appendix, *infra*, pp. 16-17, 18-22); *Clawson & Bals* v. *Harrison*, 108 F. 2d 991, 994 (C.A. 7th), certiorari denied, 309 U.S. 685; *Clawson & Bals* v. *United States*, 182 F. 2d 402, 405 (C.A. 7th).

The taxpayer was not engaged in repairing automobile engines for the owners. He was engaged in building automobile engines for sale at wholesale by combining salvaged parts from old automobile engines acquired by him for that purpose with new parts acquired by purchase. With a rebored block salvaged from an old automobile engine—which he had himself rebored and machined to make it useable—as the principal component, and by combining used parts salvaged from old automobile engines—some of which also had been reworked by him to make them useable and none of which could be identified as having been salvaged from the same engine—with the new parts purchased by him, the taxpayer produced a completely assembled and

[5] The taxpayer repeatedly attempts to impute to the Government various concessions in this connection (e.g., Pet. 2, 3, 9). Each of these alleged concessions either is inaccurately stated by the taxpayer or was in fact never made.

useable automobile engine. The end product was not simply a repaired automobile engine or a second hand automobile engine, as those terms are generally understood, but was an entirely new engine in every respect except that it was built around a salvaged and reconditioned block with salvaged and reconditioned parts as well as new parts, and was sold to the wholesale trade as a replacement for a worn out or unserviceable automobile engine. This entire process—and not merely his machining operations—clearly constitutes "manufacture" within the meaning of the applicable statutes, departmental rulings, and decisions cited above, and the District Court and the Court of Appeals did not err in so holding.

2. The courts below also did not err in holding that the taxpayer's "ultimate product" was in effect a new motor manufactured by the taxpayer, and in so holding it did not decide any issue contrary to the decisions of this Court cited by counsel. (Pet. 11-12.)

In the first place, as we have pointed out, taxpayer's ultimate product was not an "assembled second hand motor" as the petition refers to it. (Pet. 12.) The District Court found, and its finding is fully supported by the evidence, that "The rebuilt engines produced by Sun are a new and different article from the old engines which it has used as a source of salvageable parts." (R. 31.) The taxpayer was not reselling second hand automobile engines. He was selling automobile engines which he had built. "The finished product was sold at a fixed price for each model and the taxpayer gave a new motor warranty to the purchaser." (Pet. 21.) It was not a second sale of a taxed part, but a first sale by the manufacturer thereof. Hence, there is no conflict with the decision in *Indian Motorcycle Co.* v.

United States, 283 U.S. 570, as asserted by counsel. (Pet. 11.)

Likewise, *Wilson* v. *Simpson*, 9 How. 108, and *Tide Water Oil Co.* v. *United States*, 171 U.S. 210, cited by taxpayer (Pet. 11), are not in point. *Wilson* v. *Simpson* is a patent case involving the question of what repairs may be made by a purchaser of a patented article without constituting infringement. If it can be considered in any way applicable to the facts of this case, it is more in harmony with the decision below than otherwise, because it clearly demonstrates that the taxpayer's operations did not constitute "repairing" automobile engines as the term was there used. Nor was the taxpayer merely assembling parts into a useable article for which they had been specifically ordered and prefabricated as in the *Tide Water Oil Co.* case, *supra*, a customs case dealing with a statute referring to "wholly manufactured" articles.

Taxpayer's claim (Pet. 10-11) of conflict with the decision in *United States* v. *Armature Exchange*, 116 F. 2d 969 (C.A. 9th), certiorari denied, 313 U.S. 573, is also without substance. In that case, burned and worn out armatures were acquired, stripped to the core, and by means of various machine and hand operations, through the use of the old core and new material, turned out for the general market as rebuilt armatures. The Court of Appeals held the process to be manufacturing within the meaning of the statute. In the instant case, the court below, relying on the *Armature Exchange* decision and a number of other similar decisions, properly held (Pet. 23) that "There is no material difference in the rebuilding of armatures, generators, and connecting rods, and in rebuilding motors." Contrary to taxpayer's assertion that the

court below fell "into the error of flagrant discrimination with regard to the motor" (Pet. 13); its decision is in complete harmony with the many decisions of the other Courts of Appeals dealing with other types of rebuilt automobile parts.[6]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
JOHN N. STULL,
ROBERT N. ANDERSON,
FRED E. YOUNGMAN,
Attorneys.

AUGUST 1957.

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[6] See note 3, *supra*.

The administrative rulings cited by the taxpayer (Pet. 13, 25-30) do not apply to the situation involved in this case. In any event, in Rev. Rul. 56-189 (Appendix, *infra*, pp. 22-23), the Internal Revenue Service expressly disavowed, as unsound, the rulings relied upon, and it is well established that the Commissioner and the courts are not bound, in one taxpayer's case, to perpetuate mistakes the Commissioner has made in the treatment of other taxpayers (*Peony Park* v. *O'Malley*, 223 F. 2d 68, 673 (C. A. 8th), certiorari denied, 350 U. S. 845, rehearing denied, 350 U. S. 898), for a taxpayer does not acquire a vested right in a mistake made by the Commissioner in the exercise of his quasi judicial functions. Cf. *Henricksen* v. *Seward*, 135 F. 2d 986, 989 (C. A. 9th).

APPENDIX

Internal Revenue Code of 1939:

SEC. 3403. TAX ON AUTOMOBILES, ETC.

There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

(a) [As amended by Sec. 544(a), Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 481(a), Revenue Act of 1951, c. 521; 65 Stat. 452]: Automobile truck chassis, automobile truck bodies, automobile bus chassis, automobile bus bodies, truck and bus trailer and semitrailer chassis, truck and bus trailer and semitrailer bodies, tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer (including in each of the above cases parts or accessories therefor sold on or in connection therewith or with the sale thereof), 8 per centum, except that on and after April 1, 1954, the rate shall be 5 per centum. A sale of an automobile truck, bus, or truck or bus trailer or semitrailer, shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

(b) [As amended by Sec. 481(b), Revenue Act of 1951, *supra*] *Other Chassis and Bodies, Etc.*— Other automobile chassis and bodies, chassis and bodies for trailers and semitrailers (other than house trailers) suitable for use in connection with passenger automobiles, and motorcycles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 10 per centum, except that on and

after April 1, 1954, the rate shall be 7 per centum. A sale of an automobile, trailer, or semitrailer shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

(c) [As amended by Sec. 544(b), Revenue Act of 1941, *supra*, Sec. 605(c), Revenue Act of 1950, c. 994, 64 Stat. 906, and Sec. 481(c) and (d); Revenue Act of 1951, *supra*.] Parts or accessories (other than tires and inner tubes and other than radio and television receiving sets) for any of the articles enumerated in subsection (a) or (b), 8 per centum, except that on or after April 1, 1954, the rate shall be 5 per centum. For the purposes of this subsection and subsections (a) and (b), spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in subsection (a) or (b), shall be considered parts or accessories for such articles, whether or not primarily adapted for such use. This subsection shall not apply to chassis or bodies for automobile trucks or other automobiles. Under regulations prescribed by the Commissioner, with the approval of the Secretary, the tax under this subsection shall not apply in the case of sales of parts or accessories by the manufacturer, producer, or importer to a manufacturer or producer of any of the articles enumerated in subsection (a) or (b). If any such parts or accessories are resold by such vendee otherwise than on or in connection with, or with the sale of, an article enumerated in subsection (a) or (b) and manufactured or produced by such vendee, then for the purposes of this section the vendee shall be considered the manufacturer or

producer of the parts or accessories so resold. In determining the sale price of a rebuilt automobile part or accessory there shall be excluded from the price, in accordance with regulations prescribed by the Secretary, the value of a like part or accessory accepted in exchange.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3403.)

Excise Tax Reduction Act of 1954, c. 126, 68 Stat. 37:

SEC. 601. ONE-YEAR EXTENSION OF CERTAIN EXCISE TAX RATES.

(a) *Extension of Rates.*—The following provisions are hereby amended by striking out "April 1, 1954" each place it appears and inserting in lieu thereof "April 1, 1955":

* * * * *

(8) Section 3403 (relating to tax on automobiles, etc.).

* * * * *

(26 U.S.C. Appendix 1952 ed., Supp. IV; Sec. 3403.)

Internal Revenue Code of 1954:

SEC. 4061. IMPOSITION OF TAX.

(a) *Automobiles.*—There is hereby imposed upon the following articles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof) sold by the manufacturer, producer, or importer a tax equivalent to the specified percent of the price for which so sold:

* * * * *

(2) Articles taxable at 10 percent except that on and after April 1, 1955, the rate shall be 7 percent—

Automobile chassis and bodies other than those taxable under paragraph (1).

* * * * *

A sale of an automobile, trailer, or semitrailer shall, for the purposes of this paragraph, be considered to be a sale of the chassis and of the body.

(b) *Parts and Accessories.*—There is hereby imposed upon parts or accessories (other than tires and inner tubes and other than automobile radio and television receiving sets) for any of the articles enumerated in subsection (a) sold by the manufacturer, producer, or importer a tax equivalent to 8 percent of the price for which so sold, except that on and after April 1, 1955, the rate shall be 5 percent.

(26 U.S.C. 1952 ed., Supp. IV, Sec. 4061.).

Treasury Regulations 46 (1940 ed.):

Sec. 316.4. *Who is a manufacturer.*—The term "manufacturer" includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.

Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnishes materials and retains title

thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufacturers or produces it, will be considered the manufacturer.

A manufacturer who sells a taxable article in a knockdown condition, but complete as to all component parts, is liable for the tax, and not the person who buys, and assembles a taxable article from, such component parts.

Sec. 316.55. *Definition of parts or accessories.*—The term "parts or accessories" for an automobile truck or other automobile chassis or body, taxable tractor, or motorcycle, includes (a) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (b) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, and (c) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use.

The term "parts and accessories" shall be understood to embrace all such articles as have reached such a stage of manufacture that they are commonly or commercially known as parts and accessories whether or not fitting operations are required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles.

Spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, automobile truck or other automobile chassis, taxable tractors, or motorcycles, are considered

parts of or accessories for such articles whether or not primarily designed or adapted for such use.

Rev. Rul. 54-329, 1954-2 Cum. Bull. 405:

Advice is requested whether persons engaged in rebuilding, reconditioning, or repairing automobile parts and accessories are considered to be the manufacturers or producers of such articles within the meaning of section 3403(c) of the Internal Revenue Code and subject to the tax imposed by that section.

Section 3403(c) of the Code imposes a tax of 8 percent of the price for which parts or accessories (other than tires, inner tubes, and radio or television receiving sets) for any of the articles enumerated in subsection (a) or (b) of section 3403 are sold by the manufacturer, producer, or importer. The terms "manufacturer" and "producer" are not defined in the Code. However, Regulations 46, containing the administrative regulations adopted in clarification of the Code, provide in section 316.4 that the term "manufacturer" includes a person who produces a taxable article from scrap, salvage, or junk material as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.

For the purpose of the ruling made herein, a "manufacturer" is further defined as a person engaged in the production of rebuilt auto parts or accessories for sale or for use in further manufacture of other articles for sale. The term "parts," as used herein, means automobile parts or acces-

sories. The terms "reconditioning," "rebuilding," and "repairing," as used herein, are not used synonymously. Each refers to a separate and distinct operation. While each operation may be performed by a different person, it is likewise true that one person may perform all three operations and the characterization of such person as a "reconditioner," "rebuilder," or "repairer" depends upon the character of the operation he is then engaged in performing. The conclusions of the Internal Revenue Service as to what is comprised within each operation and the taxable consequences thereof are as follows:

(1) *Reconditioning.*—The mere disassembling, cleaning, and reassembling (with any necessary replacements of worn parts with taxpaid parts) of used automobile fuel pumps, water pumps, carburetors, distributors, shock absorbers, windshield-wiper motors, brake shoes, clutch disks, voltage regulators, etc., are regarded as reconditioning operations distinct from the manufacture or production of rebuilt articles. The sale or use of such reconditioned parts is not taxable, regardless of who performs the reconditioning operations. However, any new taxable parts produced or purchased tax free for use in further manufacture, but used as replacements in reconditioning such units, are subject to the tax when used by the reconditioner.

(2) *Rebuilding.*—Reboring or other machining, rewinding, and comparable major operations performed on used parts being processed for sale or for use as components of other ar-

ticles for sale are defined as rebuilding operations constituting manufacture for purposes of the tax. The person owning parts being rebuilt for such disposition is the rebuilder (manufacturer) and is liable for the tax on his sales of the rebuilt parts or on their use as components of other articles manufactured by him for sale. The tax applies whether the machining, etc., operations are performed by the rebuilder himself or by some other person in his behalf.

The manufacturers' excise tax applies to the rebuilder's sale of (a) rebuilt batteries, (b) rebabbitted or machined connecting rods, (c) resurfaced clutch plates, (d) rewound armatures, (e) reground or remetalized crankshafts, (f) engines in which blocks are machined (e.g., cylinders rebored, new sleeves inserted, with or without cylinders being rebored) or new blocks installed, and (g) similar parts on which machining, rewinding, or comparable operations are performed.

The tax due upon the sale of a rebuilt part is based upon the price for which such part is sold, excluding the value of a like part accepted in exchange. The tax due on the use of a rebuilt part as a component of another article manufactured by the rebuilder for sale is based upon the price for which such or similar rebuilt parts are sold in the ordinary course of trade, excluding the value of a like part accepted in exchange. Where a taxpaid part is used as a component in the manufacture of the rebuilt part, appropriate relief through refund or credit may be obtained

pursuant to the provisions of section 3443(a)(1) of the Code.

The conclusion of the Service that rebuilding constitutes manufacturing and that the sale of rebuilt parts is subject to manufacturers' excise tax has been sustained by the courts. See *Clawson and Bals, Inc.*, v. *United States*, 182 Fed. (2d) 402, certiorari denied, 340 U.S. 883; *Armature Exchange, Inc.*, v. *United States*, 116 Fed. (2d) 969, certiorari denied, 313 U.S. 573.

(3) *Repairing.*—The restoration of an owner's part to usable condition (but not for purposes of sale or for use as a component of other articles for sale) constitutes a repair operation whether performed by the owner himself or by others acting in his behalf. As manufacturing has been defined as the production of rebuilt articles for sale, a rebuilding operation will under no circumstances be considered a repair, since the purpose of rebuilding as construed above is the restoration of the article for sale. The use by an owner of a repaired part does not give rise to a tax under section 3444 of the Code, since such use by a person who is not construed to be a manufacturer or producer is not considered the kind of use contemplated by that section. Conversely, however, the use by a rebuilder of a rebuilt part will be taxable under such section.

Where a part has been repaired, the repairer must retain in his possession such evidence or documents from which the nontaxable nature of the operation can be readily ascertained. However, if taxpaid parts are used or sold in the

course of a repair operation, no adjustment of the tax thereon will be allowable.

S. T. 927, C. B. 1942-2, 225, and S. T. 932, C. B. 1945, 431, superseded.

S. T. 937, C. B. 1951-1, 151, holds that rebuilders of used automobile engines may, in lieu of using actual values of individual engine blocks accepted in part payment of rebuilt engines sold on an exchange basis, ascribe to blocks of all makes, types, and models so accepted a uniform value of 35 percent of the "exchange price" in the computation of the tax payable under section 3403(c) of the Internal Revenue Code.

Section 481(d) of the Revenue Act of 1951, effective November 1, 1951, added the following sentence to section 3403(c) of the Code:

> In determining the sale price of a rebuilt automobile part or accessory there shall be excluded from the price * * * the value of a like part or accessory accepted in exchange.

In view of the fact that S. T. 937, *supra*, was superseded by the addition of the above-quoted sentence, it is hereby revoked.

Rev. Rul. 56-189, 1956-1 Cum. Bull. 503:

The Internal Revenue Service has reconsidered Revenue Ruling 54-329, C. B. 1954-2, 405, and Revenue Ruling 55-98, C. B. 1955-1, 524, particularly with reference to the taxability of reassembled generators containing armatures rewound by the reassembler and rebuilt clutch assemblies. As a consequence of such reconsideration, the Service

has now concluded that the positions taken in these rulings as applied to reassembled generators and rebuilt clutch assemblies are not sound.

Therefore, it is held that the manufacturers excise tax applies to the rebuilder's sale of a reassembled generator containing an armature rewound by the reassembler, and to a rebuilt clutch assembly. Revenue Ruling 55-98 is revoked and Revenue Ruling 54-529 is modified accordingly.

Because of the reliance which may have been placed on these Revenue Rulings by generator and clutch rebuilders, the instant ruling will not be applied to sales occurring prior to June 1, 1956, except that any tax which may have been paid by generator rebuilders on generators containing armatures rewound by them or by clutch rebuilders will not be refunded.

S. Rep. No. 781, 82d Cong., 1st Sess., p. 99 (1951-2 Cum. Bull. 458, 529):

With respect to reconditioned or rebuilt parts, where such sales are subject to the parts and accessories tax under present law; section 471 of both your committee's bill and section 481 of the House bill provide an amendment which excludes from the tax base the fair market value of any like part traded in for a reconditioned or rebuilt part. Where an automotive part is not performing satisfactorily and the car owner cannot afford a new one, he has the choice of either having the old one reconditioned, usually in a local shop, or of trading in the old part on a similar one which already has been reconditioned. The first of these alternatives,

having the old part reconditioned, is not subject to the tax on automotive parts and accessories since there is no transfer of title. However, this alternative is not widely availed of because the car owner is not able to use his car during the reconditioning period. Under the second alternative, trading in the old part on a similar one which already has been reconditioned, there is a transfer of title and therefore such sales are subject to tax. The amount subject to tax in these cases is the charge to the car owner, plus the fair market value of the part he trades in. This not only presents the difficult administrative problem of determining the fair market value of the old part, but also is inequitable since trading in the old part is a substitute for repairing the car owner's old part. Only the value added in this case could be considered as new manufacturing, since in effect the car owner already owned the portion of the reconditioned part representing the value of the old part. To tax him on the fair market value of the part he turns in is to tax him on something he already owns. The exclusion of the value of the trade-in, as provided by your committee's amendment, removes this inequity. This also removes the difficult administrative problem of determining the fair market value of the old part, since the tax base will be limited to the cash payment required.

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